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No. 01-682

In the Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), provides that "[n]o otherwise qualified individual with a disability" shall, "solely by reason of" the disability, be "excluded from the participation in," or "denied the benefits of," or "subjected to discrimination under," any public "program or activity" that receives federal financial assistance. Section 202 of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, prohibits the same conduct, but applies more generally to any public program, activity, or service regardless of the receipt of federal funds. The question presented in this case is:

Whether punitive damages may be awarded against a municipal government in an implied private cause of action brought under Section 504 of the Rehabilitation Act or Section 202 of the ADA.

RULE 24.1(b) STATEMENT

Pursuant to Rule 24.1(b), petitioner Kay Barnes states that the other parties in the court of appeals were the following defendants named in their official capacities as members of the Board of Police Commissioners of Kansas City, Missouri: Dr. Stacey Daniels-Young, Jeffrey J. Simon, Joseph J. Mulvihill, and Dennis C. Eckold. Although the Eighth Circuit's caption also lists as defendants Richard Easley, in his official capacity as Chief of Police of the Kansas City, Missouri, Police Department, and Neil Becker, in his official capacity as a member of the Kansas City Police Department, both were in fact dismissed from the case by the trial court prior to the entry of judgment. See note 11, *infra*. In this Court, the petitioners in addition to Commissioner Barnes are Commissioner Daniels-Young, Commissioner Eckold, and Commissioner Karl Zobrist (who has succeeded to the office previously held by Jeffrey J. Simon, see S. Ct. Rule 35.3), all in their official capacities. Commissioner Mulvihill resigned from the Board of Police Commissioners effective on May 26, 2001; his successor has not yet been named, but will become a petitioner once he or she takes office. S. Ct. Rule 35.3.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 257 F.3d 738. The order denying rehearing en banc (Bowman and Loken, JJ., dissenting) and panel rehearing (Pet. App. 52a) is unreported. A previous opinion of the court of appeals (*id.* at 35a-51a) is reported at 152 F.3d 907. The opinion of the district court vacating the punitive damages award (Pet. App. 21a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2001, and rehearing was denied on August 20, 2001 (Pet. App. 52a). The petition for a writ of certiorari was timely filed on November 8, 2001, and granted on January 11, 2002. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article I, § 8 of the United States Constitution provides in part: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. Art. I, § 8.

Pertinent provisions of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and the Civil Rights Act of 1991, all as amended, and of the relevant federal regulations, are set forth in an appendix to this brief (App., *infra*, 1a-10a).

STATEMENT

This case arises out of the arrest of a disabled nightclub patron (respondent Jeffrey Gorman) who got into an altercation with a bar employee, was forcibly ejected from the premises, and then, once outside, refused to leave when asked by off-duty police officers. After being placed under arrest for trespassing, Gorman,

who is paraplegic and confined to a wheelchair, was transported to the police station in a van that was equipped with a bench but not with wheelchair locks. Despite precautions taken to secure him, Gorman fell from the bench during the trip after he loosened his seatbelt and another belt that had been used to secure him somehow came undone. On the basis of injuries he claimed to have sustained in the fall, Gorman sued several members of the Kansas City Police Department and Board of Police Commissioners, alleging violations of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and Section 202 of the Americans with Disabilities Act, 42 U.S.C. § 12132.

The jury awarded Gorman more than $1 million in compensatory damages. It also awarded him punitive damages of $1.2 million. Although the district court vacated the $1.2 million penalty as legally impermissible, the court of appeals reversed. In deciding that punitive damages could be recovered from a municipal government under these provisions of the federal civil rights laws, the Eighth Circuit expressed "sympath[y]" with the contrary view held by the Sixth Circuit, but deemed itself "compel[led]" by *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), to "part[] ways" and — albeit "not with great satisfaction" – to recognize an implied judicial remedy of punitive damages. Pet. App. 12a-3a, 15a-16a.

A. The Statutory And Regulatory Framework

1. Although this case involves punitive damages claims brought under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and Section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, those two provisions are part of a series of closely related civil rights statutes that originated in Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000d *et seq.*). Title VI provides that no person "shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Title VI also directs every federal "department or agency

which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract" to "effectuate" this non-discrimination command "by issuing rules, regulations, or orders of general applicability" that are "consistent with achievement of the objectives of the statute authorizing the financial assistance." *Id.* § 2000d-1. "Compliance with any requirement adopted pursuant to" Section 2000d-1, moreover, "may be effected" by, among other things, "the termination of or refusal to grant or continue assistance under such program or activity," after there has been "an express finding on the record" of noncompliance by a recipient of federal monies in an administrative proceeding. *Ibid.*

Eight years after enacting Title VI, Congress enacted Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235 (codified at 20 U.S.C. § 1681 *et seq.*). In language closely paralleling Title VI, Title IX prohibits educational activities and programs that receive federal funding from discriminating against, or denying their benefits to, individuals "on the basis of sex." 20 U.S.C. § 1681(a). Title IX also contains a provision relating to "federal administrative enforcement" of that non-discrimination command that is patterned after Title VI's enforcement provision. See 20 U.S.C. § 1682 (authorizing "the termination of or refusal to grant or continue assistance under such program or activity" in the case of a finding of noncompliance by a recipient of federal funding).

The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, authorizes funding of vocational and other rehabilitation services for the disabled and – like Title VI and Title IX – imposes certain conditions on the recipients of federal funds. Among other things, the Act (in § 504) bars discrimination against persons with disabilities under federal grants and programs and (in § 501) places certain obligations on federal agencies with respect to the employment of the disabled. See 29 U.S.C. §§ 791, 794(a). In language mirroring Title VI and Title IX, Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability,

be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

In 1978, Congress amended the Rehabilitation Act by adding a provision (§ 505) clarifying the procedures and remedies applicable to Section 504. Pub. L. No. 95-602, tit. I, § 120(a), 92 Stat. 2982. It provides that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance * * * under section 794 of this title." 29 U.S.C. § 794a(a)(2).

In enacting Title VI, Title IX, and Section 504 of the Rehabilitation Act, Congress did not expressly provide for a private cause of action. This Court, however, has ruled that implied rights of action exist under Title IX (*Cannon* v. *University of Chicago*, 441 U.S. 677, 704-05 (1979)) and Title VI (*Guardians Ass'n* v. *Civil Serv. Comm'n of City of New York*, 463 U.S. 582 (1983)).

In 1990, Congress passed the Americans with Disabilities Act ("ADA"), Pub. L. No. 101-336, 104 Stat. 327. In familiar language, Section 202 of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Section 203 of the ADA, in turn, specifies that "[t]he remedies, procedures, and rights set forth in section 794a of Title 29 [Section 504 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." 42 U.S.C. § 12133.

Following enactment of the ADA, Congress passed the Civil Rights Act of 1991, Pub. L. No. 102-166, tit. I, § 102, 105 Stat. 1072. Among other things, the 1991 Act created a limited right to recover punitive damages (subject to specified monetary caps) in certain actions brought under Section 501 of the Rehabilitation

Act, 29 U.S.C. § 791, and Section 102 of ADA, 42 U.S.C. § 12112. See 42 U.S.C. § 1981a(a)(2). The punitive damages provision does *not* apply to Section 504 of the Rehabilitation Act or to Section 202 of the ADA. The 1991 Act also provides that the newly authorized punitive damages remedy may not be recovered from any "government, government agency or political subdivision." *Id.* § 1981a(b)(1).

2. Pursuant to Congress's mandate in the 1978 Act, the Department of Justice has issued regulations implementing Section 504 of the Rehabilitation Act with respect to local law enforcement agencies (such as the Board of Police Commissioners of Kansas City) and other recipients of federal financial assistance from the Justice Department. Those regulations are the same in all relevant respects today as they were when respondent was arrested. See 28 C.F.R. §§ 42.501-42.505, 42.530 (1992, 2001). Among other things, they require recipients to include an assurance of compliance with Section 504 and with the regulations themselves in every application for federal assistance (*id.* § 42.504(a)); to evaluate and modify their policies and practices that do not comply with these statutory and regulatory obligations (*id.* § 42.505(c)(1)); to provide an opportunity for interested persons to participate in this process of self-evaluation (*ibid.*); to make available for public inspection, in certain circumstances, various self-evaluation documents (*id.* § 42.505(c)(2)); to designate a responsible employee to coordinate compliance (*id.* § 42.505(d)); and to adopt a grievance procedure (*id.* § 42.505(e)).

In a provision entitled "Remedial action," the regulations further provide that, if the Justice Department "finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or [these regulations], the recipient shall take the remedial action the Department considers necessary to overcome the effects of the discrimination." *Id.* § 42.505(a). The regulations also require each written assurance signed by a funding recipient to "include provisions giving notice that the United States has a right to seek judicial enforcement of section 504 and the assurance." *Id.* § 42.504(a).

The regulations also provide that, with certain exceptions not relevant here, the "procedural provisions" of the regulations "applicable to title VI of the Civil Rights Act of 1964 (28 CFR 42.106-42.110) apply" to recipients under Section 504 of the Rehabilitation Act. Today as in 1992, the Justice Department's procedural regulations relating to Title VI set forth certain measures "for effecting compliance" with the regulatory requirements. 28 C.F.R. § 42.108 (1992, 2001). Among other things, the regulations state that "[if] there appears to be a failure or threatened failure to comply" and such failure "cannot be corrected by informal means," the "responsible Department official may suspend or terminate, or refuse to grant or continue, Federal financial assistance, or use any other means authorized by law, to induce compliance." *Id.* § 42.108(a). Moreover, "[s]uch other means include, but are not limited to: (1) Appropriate proceedings brought by the Department to enforce * * * any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law." *Id.* § 42.108(a)(1). In a subsection entitled "noncompliance with assurance requirement," the regulation further states that if an applicant for federal funding (or a recipient) "fails or refuses to furnish an assurance" of compliance, or "fails or refuses to comply with the provisions of the assurance it has furnished," federal assistance "may be suspended, terminated, or refused." *Id.* § 42.108(b).[1] The Department of Justice has also issued regulations that implement Section 202 of the ADA, 42 U.S.C. § 12132. See 28 C.F.R. § 35.101 *et seq.* (1992, 2001).

[1] The Department's procedural regulations also provide that "[n]o action to effect compliance by any other means authorized by law shall be taken until: (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the action has been approved by the Attorney General, and (3) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance." 28 C.F.R. § 42.108(d) (1992, 2001).

B. The Events Underlying This Lawsuit

Respondent Jeffrey Gorman was rendered paraplegic by an auto accident in 1988. Pet. App. 2a. On a Saturday night in May 1992, Gorman and a friend were out drinking at a country-and-western nightclub in Kansas City, Missouri, when they got into an argument with a bouncer. *Ibid.*; J.A. 56-57.[2] According to three off-duty police officers in the bar who were working as private security and who witnessed the altercation, Gorman screamed obscenities and acted belligerently. J.A. 40-41, 50-51, 56-57. As a result, Gorman was carried out of and forcibly expelled from the bar. Pet. App. 2a; J.A. 40. Outside, he approached several off-duty police officers in the hope that they would intercede. Pet. App. 2a. The officers, several of whom had witnessed the fight inside, instead told Gorman that he had to leave. *Id.* at 3a. When Gorman refused to move away from the bar's entrance, he was arrested for trespass. *Ibid.*; J.A. 57-58; Tr. 65.

Sometime thereafter, a police van arrived to transport Gorman to the station for booking. The van was driven by Officer Neil Becker, a police department veteran of nearly twenty years. Pet. App. 3a; J.A. 5-6. Gorman testified that, while waiting for the van, he told the off-duty officers that he had to go to the restroom to empty his full urine bag.[3] Pet. App. 3a; J.A. 5-6. The off-duty officers (whom Gorman sued in a separate lawsuit, which was

[2] As the court appeals correctly noted, "[a]lmost every element of what happened that night was contested by the defendants, whose testimony was that Gorman did not instruct the officers how to transport him, offered no input whatsoever, and was thoroughly drunk and belligerent." Pet. App. 3a n.2. Except where otherwise noted, we (like the court of appeals) present Gorman's version of events because he prevailed below. *Ibid.*

[3] "Gorman * * * lacks voluntary control over his lower torso and legs, including his bladder. His inability to steady himself with his abdominal muscles and legs confines him to a wheelchair specially designed to keep him upright. He must also wear a catheter attached to a urine bag around his waist * * *." Pet. App. 2a.

settled) told Gorman to wait until he got to the station. Pet. App. 3a.

The police van was equipped with a bench but lacked wheelchair locks, which would have permitted Gorman's transportation in his chair. Pet. App. 3a; J.A. 42. Gorman testified at trial that he told the officers that he was unable to stay upright without his wheelchair and could not ride in the van without risking a fall from the bench. Pet. App. 3a; J.A. 5-6.[4] Officer Becker, in contrast, testified that Gorman was antagonistic and uncooperative, and did not assist the officers in determining how best to transport him in the van. J.A. 34-36.[5]

The officers placed Gorman on the bench and used a seatbelt to strap him in. Pet. App. 3a. As an extra precaution, they also used Gorman's own belt to strap him to the wire mesh behind the bench to secure him in an upright position. *Ibid.*; J.A. 10. Gorman testified that the seatbelt lay across his already full urine bag. Pet. App. 3a; J.A. 9. According to Gorman, the officers loosened the seatbelt after he complained about it. Pet. App. 3a; Tr. 80-81. Kansas City police officers usually handcuff arrestees before transporting them. Tr. 363-64. In this case, however, Officer Becker did not handcuff Gorman, but instead allowed

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[4] Neither Officer Becker nor Officer William Warren, the off-duty police officer who helped secure Gorman in the van, recalled Gorman mentioning that he could not be transported in the van. J.A. 36, 61. According to Officer Warren, moreover, Gorman never mentioned a need for back support or the special wedged cushion from his wheelchair. J.A. 61.

[5] Officer Becker's testimony about Gorman's belligerence and lack of cooperation outside of the bar was confirmed by no fewer than four other off-duty police officers, including two of the three who testified about Gorman's belligerence *inside* the bar. J.A. 52, 56-57, 59, 60, 62-64. Moreover, Sergeant Joellen Hudson, a member of the Kansas City Police Department since 1979 and the senior-ranking off-duty officer at the scene, discussed Gorman's transportation with Officer Becker and advised him that, given Gorman's attitude and belligerence, transporting Gorman in a police car would not be safe. Tr. 597, 595; J.A. 63-64

Gorman to use his hands and arms for additional support. J.A. 35. Officer Becker testified that Gorman was securely belted when the van left the scene and he assumed the seatbelt would prevent Gorman from falling forward. J.A. 36-37.

Officer Becker, the only on-duty officer, then drove the van to the police station. Pet. App. 3a; Tr. 330. At some point during the ride, Gorman released his seatbelt out of concern over the pressure it was placing on the urine bag. Pet. App. 3a; J.A. 20. Eventually, the other belt also came undone and Gorman fell to the floor, causing the urine bag to rupture. Pet. App. 3a-4a; Tr. 80-81, 83. Officer Becker stopped the van but was unable to lift Gorman by himself, so he fastened Gorman to a support in the back of the van for the duration of the trip. Pet. App. 4a; Tr. 82, 349. After arriving at the station, Gorman was booked, processed, and released. Pet. App. 4a. He was subsequently convicted of misdemeanor trespass. *Ibid.*

C. The Proceedings Below

1. On May 30, 1995, Gorman filed an action in the United States District Court for the Western District of Missouri alleging that, "by reason of" his disability, he had been "excluded from participation in" or "denied the benefits of" the "programs" or "activities" of the Kansas City Police Department, in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and Section 202 of the ADA, 42 U.S.C. § 12132.[6] Gorman named as defendants Officer Becker, then-Chief of Police Steven Bishop, and various current or former members of the Board of Police Commissioners of Kansas City ("the Board"), including the Mayor of Kansas City, Missouri (who by virtue of that position

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[6] Gorman did not allege that he had been arrested because he was disabled or that he was otherwise "subjected to discrimination" by petitioners on the basis of his disability. His claim, instead, was that he had been "denied the benefits of" the public "service" of transporting arrestees, or had been "excluded from participation" in that "program," on the basis of his disability even though he was "otherwise qualified" to receive those benefits or participate in that program.

automatically serves as a Member of the Board).[7] Gorman sought compensatory damages, alleging that, after his fall in the police van in May 1992, he began to have certain medical problems, including a bladder infection and shoulder and back pain. Pet. App. 4a; J.A. 13-14. He also sought punitive damages.

Following an initial dismissal by the district court (see *Gorman* v. *Bishop*, 919 F. Supp. 326 (W.D. Mo. 1996); *Gorman* v. *Bartch*, 925 F. Supp. 653 (W.D. Mo. 1996)), the court of appeals remanded the case for a trial of respondent's claims against petitioners – in their official capacity only. Pet. App. 35a-51a.[8] A trial was conducted on April 5-7, 1999. As noted above, the trial featured conflicting testimony about the underlying events and respondent's behavior before and after his ejection from the

[7] The Board members named in the original complaint were Mayor Emanuel Cleaver II, John Dillingham, Jack Headley, Jacqueline Paul, Balius Tate, Donna Boley, and Albert Riederer. Resp. C.A. App. 25. In an amended complaint filed on November 6, 1995, respondent added defendants Stacey Daniels[-Young] and James F. Ralls, Jr., and omitted defendant Riederer. Resp. C.A. App. 29; see also page ii, *supra* & note 11, *infra*.

[8] In so doing, the Eighth Circuit rejected petitioners' submission – which the district court had accepted – that the activities of law enforcement officers in making arrests in the field and transporting arrestees to the police station were not "services," "programs," or "activities" that respondent had been "qualified" for but "denied the benefit of" within the meaning of the Rehabilitation Act or the ADA. Pet. App. 40a-46a. Nevertheless, the court of appeals acknowledged that, at the time of Gorman's arrest in 1992, "[t]here were no cases addressing [the ADA's] possible application to government agencies like police departments or to the transportation of arrestees." *Id.* at 49a. For that and other reasons, the court concluded that "it cannot be said that reasonable police officials in May of 1992 would have known that the actions alleged" by Gorman "in respect to the transportation of a disabled arrestee were subject to, and in violation of," the Rehabilitation Act and the ADA. *Id.* at 50a. On that basis, the Eighth Circuit upheld the dismissal, on grounds of qualified immunity, of respondent's claims against the individual petitioners in their individual capacities. *Ibid.*

bar. There was also conflicting evidence about the extent of Gorman's injuries and their cause.[9]

Over the objection of petitioners, who maintained that punitive damages were unavailable as a matter of law, the trial court instructed the jury that it could award Gorman "punitive damages in order to punish the defendant[s] for some extraordinary misconduct" or to "deter the defendants and others for like conduct in the future." J.A. 72, 21-22; Tr. 614. The court also instructed the jury that, for purposes of assessing liability for punitive damages (but not in determining whether there was a violation of the Rehabilitation Act in the first place), the jury could consider whether petitioners had a "plan for compliance," or "provided training[] for compliance with" that statute "on or before May 31, 1992." J.A. 72.

The parties entered into a lengthy stipulation concerning the obligations imposed on petitioners by the Rehabilitation Act and the ADA as well as their implementing federal regulations. They stipulated that "from the effective date of the regulations implementing the Rehab[ilitation] Act of 1973, in 1981[,] the City of Kansas City, Missouri filed written assurances with the federal government that the policies and practices of the department would be operated in accordance with the Act," but between 1981 and the date of Gorman's arrest in May 1992 the Board "had no policy regarding that act." J.A. 42; see also *id.* at 69-70.[10] Over

[9] For example, one of Gorman's doctors concluded that Gorman's shoulder pain resulted from tendinitis caused by overuse of his shoulders. J.A. 19. As for Gorman's back pain, two police officers testified that they had witnessed at least one other incident in which Gorman had fallen out of his wheelchair. J.A. 53-54, 63. One officer testified that, about a month before his trespassing arrest, Gorman had been traveling 15-25 miles per hour on the downhill slope of a road when he lost control and was ejected from his wheelchair. Another officer testified that Gorman lost control while riding on the same road with a woman sitting on his lap. It is not clear whether these were the same incident.

[10] The stipulation also noted that during this time period the Police

petitioners' objection, the trial court permitted respondent's counsel to read to the jury various provisions of the Justice Department's regulations implementing the Rehabilitation Act, including those embodying the requirements mentioned in the stipulation. J.A. 43-45. With respect to the ADA, the court permitted respondent's counsel to say that it imposed obligations that were no less stringent than those imposed by Section 504 of the Rehabilitation Act and the regulations implementing the Rehabilitation Act. J.A. 50.

In closing argument, respondent's counsel repeatedly stressed that petitioners "took money from the federal government" and submitted affidavits every year attesting to their compliance with federal regulations but "had no plan and had no training." J.A. 65; see also *id.* at 67-68 (arguing that jury's verdict should not "sweep under the rug the 16 years they ignored the law. I hope someone will say, my goodness there is a price to pay."). Counsel also emphasized that the Justice Department had made an inquiry into petitioners' compliance with the Department's regulations under the Rehabilitation Act and ADA after receiving a complaint from respondent's sister. J.A. 66-67. The jury returned a verdict in respondent's favor, awarding him compensatory damages of $1,034,817.33 and punitive damages of $1,200,000. Pet. App. 4a.[11]

Department "did not formulate a plan or modify its policies or practices pursuant to the act," "has not made self-evaluation documents of a compliance plan available for public inspection pursuant to the act," has not "designated a responsible employee to coordinate compliance," has not "adopt[ed] a grievance procedure for discrimination complaints," and has not "provided an opportunity for interested persons * * * to participate in any self-evaluation process or submit comments to them." J.A. 42-43. See page 5, *supra*.

[11] At the close of Gorman's case, the trial court dismissed the claims against Police Chief Easley (the successor to Chief Bishop) and Officer Becker in their official capacities, thus leaving only the individual Board members as defendants. See Tr. 495-96; Resp. C.A. App. 45 (jury instruction explaining dismissal). The district court's judgment was

2. Relying (Pet. App. 24a-27a) on the Sixth Circuit's en banc decision in *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (1996), the district court set aside the award of punitive damages. Pet. App. 21a-34a. Although "Congress amended portions of the Rehabilitation Act three times (including section 504 twice) and the ADA once," the district court explained, "at no time did Congress take steps to alter the consensus of judicial decisions" holding that punitive damages "were not available." *Id.* at 25a-27a. "'The only inference of congressional intent that can be drawn from the three pieces of legislation,'" the court concluded, "'is that Congress intended § 504 remedies to remain in status quo – *i.e.*, no punitive damages.'" *Id.* at 27a (quoting *Moreno*, 99 F.3d at 791).

3. A panel of the Eighth Circuit affirmed in part and reversed in part. Pet. App. 1a-20a. Although the panel stated that it was "sympathetic" to the Sixth Circuit's view that punitive damages are unavailable under Section 504 (*id.* at 8a, 12a), and even acknowledged that the "concerns" of the Sixth Circuit were "hardly misplaced" (*id.* at 13a), it nevertheless ruled ("not with great satisfaction") that the Sixth Circuit's approach was "foreclosed by controlling precedent" (*id.* at 8a, 15a) – in particular, by *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992).

In *Franklin*, this Court had held that an implied right of action under Title IX supports a claim for "monetary damages." 503 U.S. at 63. As the Eighth Circuit read *Franklin*, there is a presumption that all "appropriate remedies" will be available in an implied cause of action, which can be overcome only if Congress "expressly limit[s] the remedies available." Pet. App. 11a-12a. In the court of appeals' view, because this Court had "long made clear that punitive damages are an integral part of the common

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entered against Mayor Cleaver and Commissioners Stacey Daniels-Young, Jeffrey J. Simon, Joseph J. Mulvihill and Dennis C. Eckold, all in their official capacities as members of the Board. While this case was on appeal, petitioner Kay Barnes succeeded Emanuel Cleaver II as Mayor of Kansas City and thus as a member of the Board.

law tradition and the judicial arsenal," punitive damages "fall within the panoply of remedies *usually available* to American courts." *Id.* at 10a (emphasis added) (citing *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991)). "Given an implied cause of action," the Eighth Circuit reasoned, *Franklin* "compels the conclusion" that a plaintiff may recover "all appropriate remedies, including punitive damages" – unless there is an "express congressional statement to the contrary." *Ibid.*

Unlike the Sixth Circuit – whose "methodology and conclusions" it explicitly rejected (Pet. App. 12a) – the Eighth Circuit could not discern the requisite congressional intent to foreclose a punitive damages remedy. The court recognized that its analysis "turns * * * on its head" Congress's understanding, evident in the "text and history of the 1991 Act" (which added a limited punitive damages remedy), that in so doing Congress "intended to expand, and not to contract, the available remedies" under the Rehabilitation Act and ADA, and "considered the new language necessary to create a punitive damages remedy under the acts." *Id.* at 15a. But that evidence was not sufficiently "express" to persuade the court of appeals that Congress intended to preclude resort to punitive damages as a remedy in cases not covered by the narrow 1991 provision.

The court of appeals then remanded the case for a determination (purportedly under *Franklin*) whether an award of punitive damages was "appropriate" in this "specific case." Pet. App. 16a. Again, the panel flatly disagreed with the Sixth Circuit. As a *categorical* matter, that court had held that, "given the legislative and judicial backdrop" and a number of policy considerations, punitive damages are "not 'appropriate' as required by *Franklin*" in *any* action brought under Section 504 of the Rehabilitation Act. *Id.* at 16 n.10 (citing *Moreno*, 99 F.3d at 791-92). In the Eighth Circuit's view, the question whether a remedy is "appropriate" under *Franklin* is a case-specific (not statute-specific) inquiry. Pet. App. 16a n.10. The court therefore remanded for consideration of whether the punitive award in this case was supported by sufficient evidence and not constitutionally excessive.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Eighth Circuit in this case reluctantly upheld the availability of punitive damages under Section 504 of the Rehabilitation Act and Section 202 of the ADA. Reluctance, in fact, scarcely captures the court of appeals' evident discomfort: The court acknowledged that strong evidence pointed in the opposite direction and was "sympathetic" to the Sixth Circuit's contrary holding in *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (1996) (en banc), a decision animated (the Eighth Circuit noted) by concerns that were "hardly misplaced." Pet. App. 12a, 13a. In the Eighth Circuit's view, however, it was "compel[led]" to overlook the conflicting evidence of congressional intent and to sustain the availability of punitive damages because of this Court's decision in *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992). Pet. App. 10a, 12a. According to the Eighth Circuit, *Franklin* created a "one-way ratchet" under which, "once a cause of action is discovered, it *automatically* entitles a plaintiff to *all* appropriate remedies," including punitive damages – "and that finding then extends those remedies to *all other* interrelated statutes." *Id.* at 14a (emphases added). Moreover, unless Congress "*expressly limit[s]* the remedies available" (*id.* at 12a (emphasis added)) – which is no small feat given that the private right of action is implied (as well as subsequently defined by the judiciary) – courts are required to ignore other, telling evidence of congressional intent.

If affirmed, the Eighth Circuit's interpretation of *Franklin* – and its conclusion that punitive damages are available in this case – would go far towards ensuring that "the most questionable of private rights will also be the most expansively remediable." *Franklin*, 503 U.S. at 78 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., concurring in the judgment). There is, however, absolutely no basis for that result.

I. The court of appeals' animating premise – that Congress must be *presumed* to have made punitive damages available in this setting – ignored two fundamental principles that establish exactly the *opposite* presumption. First, where (as here) Congress

acts pursuant to its Spending Clause powers – and thus imposes on grant recipients obligations that are contractual in nature – Congress must clearly state its intent to authorize a particular remedy in the event of non-compliance, whether in punitive damages or otherwise. Second, and independently, there is a traditional immunity of municipal governments from liability for punitive damages, which this Court recognized in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981). Taken even singly, but especially together, these two principles – which are the backdrop against which Congress acted – make clear that only the most compelling evidence could overcome the presumption that Congress did *not* intend to permit punitive damages in an implied private cause of action asserted against a municipal government under Section 504 of the Rehabilitation Act and under Section 202 of the ADA. The Eighth Circuit's insistence on looking through the opposite end of the telescope was based on a profoundly misguided interpretation of this Court's decision in *Franklin*.

II. Far from overcoming the presumption against the availability of punitive damages, the text, structure, and history of Section 504 and Section 202 confirm that punitive damages are completely inappropriate. Both provisions trace their remedies to Title VI of the Civil Rights Act of 1964. But while Title VI has been construed to permit a private right of action for *compensatory* relief, its elaborate procedural protections – which ensure that the draconian remedy of a fund cut-off is imposed only a last resort, and only after an exacting series of due process measures have been exhausted – cannot be squared with the imposition of punitive damages through private litigation. What is more, when Section 504 was amended in 1978 to adopt the remedies available under Title VI, no court had ever suggested that punitive damages might be one of the options – and there is every reason to presume that Congress embraced that understanding when it adopted the Title VI scheme. Finally, in 1991, Congress *did* add – expressly – a punitive damages remedy to both the Rehabilitation Act and the ADA; significantly, however, Congress confined that remedy to *other* portions of the

statutes (not Section 504 or Section 202), and it expressly exempted governmental entities (like petitioners) from the ambit of the new provisions. As the Eighth Circuit acknowledged (Pet. App. 15a), Congress plainly believed that it was "expand[ing], and not * * * contract[ing] the available remedies" when it passed the 1991 legislation. The Eighth Circuit's contrary view makes it hard to see why Congress bothered.

ARGUMENT

I. Contrary To The Eighth Circuit's View, Only The Clearest Evidence Can Overcome The Presumption That Punitive Damages Are *Not* Available In This Case

Two fundamental principles of law – which are the backdrop against which Congress legislated – confirm that punitive damages are presumptively *not* available under Section 504 of the Rehabilitation Act and Section 202 of the ADA, at least in an action against a municipal government. The first and broader principle, reflected in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), and subsequent cases, demands special clarity when Congress places conditions on the recipients of federal funding pursuant to its Spending Clause powers. The second principle, reflected in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), is the historical immunity from punitive damages enjoyed since time immemorial by municipal governments. In light of these background principles, only the clearest evidence could overcome the presumption that punitive damages are *not* available in this case. The Eighth Circuit's contrary presumption rests on a fundamental misreading of this Court's decision in *Franklin*.

A. When Congress Acts Pursuant To The Spending Clause, It Must Clearly Express Any Conditions Imposed On The Recipients Of Federal Funding – Including The Nature Of Any Penalty That May Be Exacted In The Event Of Non-Compliance

The Eighth Circuit read *Franklin* to create a presumption that punitive damages are *available* under Sections 504 and 202 unless

Congress *unambiguously foreclosed* punitive damages. But, given that Section 504 is Spending Clause legislation and that Congress has instructed that Section 202's remedies be the same as those under Section 504, the correct presumption was exactly the opposite: punitive damages are *unavailable* under Sections 504 and 202 unless Congress *unambiguously provided for* punitive damages.

In *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981), the Court wrote:

> The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

In light of *Pennhurst*'s clear-statement principle, it is questionable whether this Court ever should have construed Spending Clause legislation (such as Title VI, Title IX, and the Rehabilitation Act) to allow implied private rights of action. See *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 685 (1999) (Kennedy, J., dissenting) ("Whether the Court ever should have embarked on this endeavor under a Spending Clause statute is open to question."). No Justice, however, has proposed to reconsider the implied private rights of action that have already been recognized by this Court's decisions. See *Franklin*, 503 U.S. at 65, 72-73; *id.* at 77-78 (Scalia, J., concurring in the judgment); *Alexander* v. *Sandoval*, 121 S. Ct. 1511, 1516, 1520 (2001).

The Court's approach, instead, has been to cast a skeptical eye on, and to insist that fund recipients have clear advance notice of, any *expansion* of the implied private rights of action previously recognized under Spending Clause legislation. Both *Gebser* v. *Lago Vista Independent School District*, 524 U.S. 274 (1998), and *Davis* v. *Monroe County Board of Education*, *supra*, are particularly instructive.

In *Gebser*, the Court was asked to expand Title IX's implied private right of action – first recognized in *Cannon* v. *Univ. of Chicago*, 441 U.S. 677 (1979), and further refined in *Franklin* – to impose liability on a school district based on theories of *respondeat superior* or constructive notice. Although the defendant in *Gebser* was a local school district rather than a State, the Court unhesitatingly applied the principles of *Pennhurst* that constrain the construction of Spending Clause legislation. Title IX and the cognate Title VI, the Court wrote, "operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." 524 U.S. at 286. The Court elaborated:

> Title IX's contractual nature has implications for our construction of the scope of available remedies. When Congress attaches conditions to the award of federal funds under its spending power, U. S. Const., Art. I, § 8, cl. 1, as it has in Title IX and Title VI, we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition. Our central concern in that regard is with ensuring that "the receiving entity of federal funds [has] notice that it will be liable for a monetary award."

Id. at 287 (citations omitted).

Because of those principles, the Court held that neither a *respondeat superior* theory nor a constructive notice theory could be used to impose liability on a fund recipient. Although the underlying conduct – sexual harassment of a student by a teacher – was unquestionably discrimination forbidden by Title IX, the *remedies* available for such conduct were constrained by *Pennhurst* and by the requirement that fund recipients be subjected to only those conditions – including liability – of which they had adequate notice. See 524 U.S. at 284 ("We made no effort in *Franklin* to delimit the circumstances in which a damages remedy should lie."); *id.* at 287 ("Title IX's contractual nature has implications for our construction of the scope of available remedies.").

Davis was another Title IX case involving allegations of sexual harassment, but it was a student rather than a teacher who was the alleged wrongdoer. Rather than hold the school district liable vicariously, the plaintiff "attempt[ed] to hold the [School] Board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools." 526 U.S. at 641. Although the Court divided sharply over whether the circumstances of that case *constituted* sufficiently unambiguous notice to the School Board that it might be held liable for deliberate indifference to known sexual harassment (and over what constitutes sexual harassment in the context of adolescents' behavior), *all nine Justices agreed that the available remedies under Title IX must be shaped by the notice requirement.* "Because we have repeatedly treated Title IX as legislation enacted pursuant to Congress' power under the Spending Clause," the majority wrote, "private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue." *Id.* at 640. The majority proceeded in the same paragraph to quote *Pennhurst*'s contract analogy, its insistence that Congress speak with a clear voice, and its recognition that there can be no knowing acceptance of legislative conditions of which the recipient is not made aware. *Ibid.* And, although *Davis* concerned the scope of proscribed conduct and not the scope of remedies, the majority repeatedly returned to *Pennhurst*'s notice requirement in delimiting the scope of Title IX's private right of action. *Id.* at 641-42, 649-50.

An adamant dissent agreed that the nature of Title IX as Spending Clause legislation was key to deciding the case, but took the majority's analysis further. First, although the defendant was a unit of local government and not a State, the dissent noted the important federalism interests served by the requirement that conditions imposed by Spending Clause legislation be unambiguous. 526 U.S. at 654-55 (Kennedy, J., dissenting); see also *Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, 122 S. Ct. 934, 939 (2002). Second, the dissent (echoing *Gebser*) emphasized that the *scope* of liability is within the clear-notice rule: "Without doubt, the scope of potential damages liability is one of the most significant factors

a school would consider in deciding whether to accept federal funds." 526 U.S. at 656. Third, the dissent synthesized those principles by observing that "the majority must establish that Congress gave grant recipients clear and unambiguous notice that they would be liable in money damages for failure to remedy discriminatory acts of their students." *Id.* at 657.[12] Fourth, the dissent complained that a "multifactored balancing test is a far cry from the clarity we demand of Spending Clause legislation." *Id.* at 675; see also *id.* at 685 (Congress must "dictate[]" a condition on funding "in unambiguous terms"); cf. Pet. App. 16a (Eighth Circuit's recognition of many factors that will have to be applied on remand to determine whether punitive damages were justified in this case).

The principles recognized by the Court in *Pennhurst* and *Gebser*, and by all nine Justices in *Davis*, make it unthinkable that the silence the Eighth Circuit perceived in Section 504 should be construed to impose punitive damages on those who have accepted federal funds.[13] Congress must state all conditions on grantees' receipt of federal funds "unambiguously" so that they are ""knowingly[] cognizant of the consequences of their participation." *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst*, 451 U.S. at 17). Nothing in the "contract" between the Federal Government and the Board of Police

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[12] The dissent argued that "[t]he majority does not carry these burdens," 526 U.S. at 657, whereas the majority contended that it had carried them. The disagreement pertained not to the clear-statement requirement, but to the clarity with which fund recipients' obligations and liabilities had been laid out.

[13] As noted above, although Section 202 of the ADA is not Spending Clause legislation, Congress dictated in Section 203 of the ADA, 42 U.S.C. § 12133, that the remedies for a violation of Section 202 be exactly the same as the remedies for a violation of Section 504 of the Rehabilitation Act. Therefore, if Spending Clause jurisprudence (or anything else) requires that punitive damages be unavailable under Section 504, then Section 203 requires that punitive damages be unavailable under Section 202.

Commissioners of Kansas City, Missouri, gave notice that punitive damages might be a "consequence of [the Board's] participation" in federal funding.[14]

Nor would ordinary principles of contract law have alerted the Board that it was exposing itself to the risk of punitive damages. The common law rule is that punitive damages are *not* a permissible remedy for breach of contract. See RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981); see also OLIVER WENDELL HOLMES, JR., THE COMMON LAW 301 (1881) ("The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses.").[15] For the Executive Branch to offer the Board of Police Commissioners federal funds on the statutory condition that it not discriminate, without a word about punitive damages, and the Judicial Branch then to say that the Police Department thereby promised to be subject not just to "remedial relief" (*J.I. Case Co.* v. *Borak*, 377 U.S. 426, 435 (1964), *quoted in Franklin*, 503 U.S. at 68) but also to *punishment*, is nothing

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[14] It is especially difficult to see how petitioners could have understood in 1992 that a condition placed on the Board's receipt of federal funds was the potential liability for punitive damages, since (1) it was "not until 1994" (several years after respondent's arrest) that there was even "a single case where punitive damages were awarded under § 504" (*Moreno*, 99 F.3d at 790), and (2) it was unclear that the relevant statutes even applied in this situation, as the court of appeals explained in upholding qualified immunity in a prior appeal (Pet. App. 46a-50a). See also note 8, *supra*.

[15] In fact, under standard principles of contract law the parties may include a provision for liquidated damages in the event of a default, but the amount must be "reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss." RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981). "A term fixing unreasonably large liquidated damages is *unenforceable* on grounds of public policy *as a penalty*." *Ibid.* (emphasis added).

less than a bait-and-switch. This Court's Spending Clause jurisprudence forbids such a conclusion.[16]

B. Congress Also Acted Against The Backdrop Of A Well-Established Immunity Of Municipal Governments Against Punitive Damages

In *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court considered whether a municipal government may be held liable for punitive damages in an action brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983. In holding that Congress did not intend to authorize punitive damages, the Court detailed the long tradition in American law – continuing to this day – of affording municipal governments immunity from punitive liability. 453 U.S. at 259-63. The Court also examined "whether considerations of public policy dictate" recognition of a punitive damages remedy against municipalities despite that longstanding immunity, and concluded that a punitive damages remedy in this setting would be inappropriate. *Id.* at 267-71. The background principle of governmental immunity recognized in *City of Newport* is no less informative in discerning Congress's intent concerning the availability of punitive damages in actions brought under Section 504 of the Rehabilitation Act and Section 202 of the ADA.

City of Newport canvassed the early case law and demonstrated that in 1871, when Congress enacted Section 1983, "the

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[16] Even when it acts pursuant to grants of authority other than the Spending Clause, Congress ordinarily must speak clearly when it wishes to impose punishment. See, *e.g.*, *Commissioner* v. *Acker*, 361 U.S. 87, 91 (1959) ("The law is settled that penal statutes are to be strictly construed, and that one is not to be subject to a penalty unless the words of the statute plainly impose it.") (internal quotations and citations omitted); *Elliott* v. *Railroad Co.*, 99 U.S. 573, 576 (1878) ("Penalties are never extended by implication. They must be expressly imposed or they cannot be enforced."); cf. *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) ("[T]he Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.") (internal quotations omitted).

immunity of a municipal corporation from punitive damages at common law was not open to serious question." 453 U.S. at 259. Moreover, more than a century later, when *City of Newport* was decided, "[t]he general rule" in American jurisdictions remained that "no punitive damages are allowed unless expressly authorized by statute." *Id.* at 260 n.21. This Court's description of the state of the law in 1981, when *City of Newport* was decided, obviously applies with equal force to the legal landscape in 1978, when Congress amended the Rehabilitation Act to include an express remedies provision, and in 1964, when Title VI was passed. Nor had anything changed by 1990, when Congress enacted the ADA. Throughout this entire period, and continuing until today, American jurisdictions have consistently recognized the immunity of municipal governments from punitive damages.

More recently, the Court relied on this background principle of immunity in interpreting the False Claims Act (FCA), which imposes "treble damages and a civil penalty of up to $10,000 per claim." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 785 (2000) (citing 31 U.S.C. § 3729(a)). Invoking "the presumption against imposition of punitive damages on governmental entities" recognized in *City of Newport*, this Court held that States and state agencies are not "persons" subject to suit under the FCA. *Id.* at 784-85. It also rejected the argument that *City of Newport* was inapplicable because the FCA was intended to benefit all U.S. taxpayers, not merely those in a particular state or municipality. "A better reading of *Newport*," the Court explained, "is that we were concerned with imposing punitive damages on taxpayers *under any circumstances*." 529 U.S. at 785 n.15 (emphasis added).

As the Third Circuit has correctly recognized, "[t]he principles derived from *City of Newport*" are "directly applicable to" Section 504 of the Rehabilitation Act and Section 202 of the ADA. *Doe* v. *County of Centre*, 242 F.3d 437, 456 (3d Cir. 2001). The Third Circuit explained:

> When Congress enacted Title II of the Rehabilitation Act, it knew of the common law rule precluding punitive damages against municipalities. Therefore, under the *City of Newport* framework, the question is whether Congress intended to disturb that settled common-law immunity.

Ibid.; see also *City of Newport*, 453 U.S. at 267 (finding "no evidence that Congress intended to disturb the settled common-law immunity").

C. The Eighth Circuit's Contrary Presumption Rests On A Fundamental Misreading Of *Franklin*

The court of appeals adopted exactly the opposite presumption in this case. Relying on this Court's decision in *Franklin*, the Eighth Circuit concluded that "once a cause of action is discovered, it *automatically* entitles a plaintiff to *all* appropriate remedies," including punitive damages – "and that finding then extends those remedies to *all other* interrelated statutes." Pet. App. 14a (emphases added). The court of appeals' reading of *Franklin* is simply mistaken.

1. The *Franklin* Presumption Does Not Apply To Punitive Damages

To begin with, it is difficult to see how *Franklin* could possibly "compel" recognition of a punitive damages remedy when no claim for punitive damages was asserted in that case. *Franklin* involved a claim for money damages by a former high school student who alleged that she had been sexually harassed by a teacher who had since left the school. The student was no longer receiving any form of education in the Gwinnett County system. In those circumstances, the "equitable remedies" suggested by the county were "clearly inadequate"; damages was the only remedy available to the plaintiff; and this Court repeatedly emphasized that a decision not to recognize a damages remedy under Title IX "would leave petitioner" with "no remedy at all." 503 U.S. at 76; see *ibid.* (denial of damages relief would leave victim of sexual harassment "remediless"). Thus, if the Court in *Franklin* had upheld the court of appeals' judgment and declined to recognize any remedy of monetary damages, it would have "render[ed] inutile causes of action authorized by Congress through

a decision that no remedy is available." 503 U.S. at 74; see also *Doe* v. *County of Centre*, 242 F.3d 437, 456 (3d Cir. 2001) (explaining that the *Franklin* presumption "is rooted in the common law principle * * * that a right without a remedy is not a right at all").

Franklin was in line with other decisions in which this Court has considered the absence of any other meaningful remedies in deciding whether a damages remedy is "appropriate." In *Davis* v. *Passman*, 442 U.S. 228 (1979), an aide to a former Member of Congress alleged that she had been discharged because of her sex in violation of constitutional equal protection guarantees. The Court's cautious recognition of a damages remedy was based on both its perception of compensatory damages as *the* ordinary remedy for such violations and the absence of other remedies:

> First, a damages remedy is surely appropriate in this case. "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens* [v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388,] 395 [(1971)]. * * * Moreover, since respondent is no longer a Congressman, * * * equitable relief in the form of reinstatement would be unavailing. And there are available no other alternative forms of judicial relief. For Davis, as for Bivens, "it is damages or nothing." *Bivens*, *supra*, at 410 (Harlan, J., concurring in judgment).

442 U.S. at 246 (footnote omitted). In unanimously reaching the opposite conclusion – that damages were *not* appropriate in a case brought by a federal employee directly under the Constitution when other statutory remedies were available – the Court in *Bush* v. *Lucas* distinguished *Davis* v. *Passman* on this exact ground: "In reaching the conclusion [in *Passman*] that an award of damages would be an appropriate remedy, we emphasized the fact that no other alternative form of relief was available." 462 U.S. 367, 377 (1983). Most recently, in *Correctional Services Corp.* v. *Malesko*, 122 S. Ct. 515 (2001), the Court declined to extend the implied damages remedy recognized in *Bivens* to a case against a private corporation operating under contract with the Bureau of Prisons,

noting that the plaintiff was "not in search of a remedy as in *Bivens* and [*Passman*]." *Id.* at 523.

Here, as in *Bush* v. *Lucas* and *Malesko*, and completely unlike *Passman* and *Franklin*, respondent Gorman is by no means in search of *a* remedy. The jury awarded him more than $1 million in compensatory damages. Pet. App. 4a. He has been made whole by that award. The only question is whether a further exaction – a *punishment* of $1.2 million – should be imposed. See also *City of Newport*, 453 U.S. at 267 (describing punitive damages award against a municipal government as "a windfall to a fully compensated plaintiff"). That is not a question that *Franklin* addressed, much less answered. Nor would it render Gorman's right of action under Section 504 of the Rehabilitation Act or Section 202 of the ADA useless if this Court were to refuse to recognize a punitive damages remedy. "[I]rrespective of the availability of punitive damages against municipalities, several other monetary remedies are available to enforce the rights in [Section 202 of the ADA] and Section 504"; for that reason the "principle of *Franklin*" is simply inapplicable to this case. *County of Centre*, 242 F.3d at 456.

The Eighth Circuit's analysis also dislodges *Franklin* from its underlying rationale. As the court below acknowledged (Pet. App. 9a), the *Franklin* Court "affirmed the rule, articulated earlier in *Bell* v. *Hood*, 327 U.S. 678, 684 (1946), that 'absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.'" But the court of appeals ignored the historical lineage of the *Bell* v. *Hood* "rule." In *Bell*, this Court held that individuals who claimed to have been subjected to illegal arrests, searches and seizures of their property, and false imprisonment by FBI officers, could recover compensatory damages in a federal action for the violation of their constitutional rights. "[W]here federally protected rights have been invaded," this Court explained, "it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the *necessary* relief." 327 U.S. 678, 684 (1946)

(emphasis added). "And it is also well settled," the Court explained, "that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use *any available remedy to make good the wrong done*." *Ibid.* (emphasis added). As support for that last proposition, this Court cited *Dooley* v. *United States*, 182 U.S. 222 (1901), and the "cases cited and discussed" in *Dooley* "at pages 228-230."

All of the cited authorities – like *Bell* v. *Hood* itself – involved the question whether a particular remedy was needed to provide full *compensation* or *restitution* to an injured or aggrieved individual. Each of the cases, in other words, required the courts to decide what relief was truly "necessary" to make the plaintiff *whole*. See *Dooley*, 182 U.S. at 223 (involving recovery of duties paid under protest on goods imported into Puerto Rico); *id.* at 228-30 (discussing cases involving, among other things, recoupment or refund of unlawfully levied taxes or penalties, claims for compensation by property owners who had suffered takings of their property for public use, and recovery for the use of patented inventions). See also *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 49-51 (1979) (discussing this "compensation principle" in context of labor law in rejecting implied punitive damages remedy for breach of duty of fair representation). Consistent with these precursors, the opinion in *Franklin* "consistently speaks in a compensatory vein." *Moreno*, 99 F.3d at 789 n.3.

Properly understood, then, the *Franklin* presumption has no bearing on the question whether courts should recognize an implied judicial remedy of punitive damages. Rather, *Franklin* should be understood to apply only to cases in which there is a need to make whole a claimant for an injury – and to ensure that federal rights are not rendered "inutile" through the denial of all effective relief. This is not such a case. Indeed, punitive damages by their very nature do not present such a case. See *Foust*, 442 U.S. at 50 ("punitive damages * * * by definition[] provide monetary relief in excess of * * * actual loss") (internal quotations omitted).

That is presumably why, to our knowledge, this Court has *never* recognized punitive damages as an appropriate remedy in an implied cause of action.

2. The *Franklin* Presumption Does Not Apply To Claims Brought Under Section 504 Of The Rehabilitation Act Or Section 202 Of The ADA

As noted above (at 4), Congress in 1978 amended the Rehabilitation Act by adding a provision (Section 505) that described the "remedies" that would be available to a private party suing for a violation of Section 504. See 29 U.S.C. § 794a(a)(2). Similarly, when Congress passed the ADA in 1990, it included a provision specifying that the "remedies" for violations of Section 202 would be those applicable to Section 504 of the Rehabilitation Act. See 42 U.S.C. § 12133. By contrast, Title IX, which was at issue in *Franklin*, contained no provision governing available remedies.

And that makes all the difference in the world, as this Court held in *Lane* v. *Peña*, 518 U.S. 187 (1996). *Lane* involved the question whether Congress had waived the federal government's sovereign immunity for awards of monetary damages to private claimants suing under Section 504. In holding that no waiver had occurred, this Court reasoned:

> The existence of the § 505(a)(2) remedies provisions *brings this case outside the "general rule"* we discussed in *Franklin*: This is not a case in which "a right of action exists to enforce a federal right and Congress is silent on the question of remedies." 503 U.S., at 69. Title IX, the statute at issue in *Franklin*, made no mention of available remedies. The Rehabilitation Act, by sharp contrast, contains a provision labeled "Remedies and attorney fees," § 505. Congress has thus spoken to the question of remedies in § 505(a)(2), the only remedies provision directly addressed to § 504 violations * * * .

Id. at 197 (emphasis added).

As *Lane* thus makes clear, the *Franklin* "presumption" or general "rule" (aside from having nothing to do with punitive damages) does not apply to claims brought under Section 504 of the Rehabilitation Act. Because Congress included a similar "remedies" provision in the ADA, and provided that the same remedies that apply under the Rehabilitation Act would apply to ADA claims, *Franklin* is equally inapplicable to respondent's claim under Section 202 of the ADA. The Eighth Circuit's reliance on *Franklin* was flatly inconsistent with *Lane*.

In all events, the *Franklin* presumption is substantially more flexible than the Eighth Circuit supposed. As this Court explained in *Gebser*, when dealing with implied private rights of action, courts "have a *measure of latitude* to shape a *sensible remedial scheme* that *best comports with the statute*." 524 U.S. at 284 (emphases added). Indeed, by its terms the *Franklin* presumption extends only to "appropriate" relief (503 U.S. at 69) – and, contrary to the Eighth Circuit's view (Pet. App. 16a), a remedy may be "inappropriate" for a particular statutory scheme, or because it undercuts well-established principles of law, and not just because it does not fit the conduct that is at issue in a particular lawsuit. See, *e.g.*, *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 48-49 (1979) (rejecting an implied remedy of punitive damages under the Railway Labor Act because such an "extraordinary sanction" is not needed to satisfy the "compensation principle" that has traditionally informed the selection of appropriate remedies and, if permitted, "could impair the financial stability of unions and unsettle the careful balance of individual and collective interests which this Court has previously articulated in the unfair representation area"); *City of Newport*, 453 U.S. at 267, 270-71 (apart from common-law immunity, the purposes underlying 42 U.S.C. § 1983 and considerations of public policy foreclose imposition of punitive damages without express legislative direction because such an award (1) "'punishes' only the taxpayers, who took no part in" the underlying conduct yet end up either "footing the bill" through "an increase in taxes" or suffering a corresponding "reduction in public services" when the municipal treasury is depleted to pay the award; (2) is "in effect

a windfall to a fully compensated plaintiff"; and (3) may present a "serious risk to the financial integrity" of a municipal government).

* * *

The short of the matter is this: Only the strongest, most compelling evidence of congressional intent could overcome the presumption that punitive damages are *not* available in an action against a municipal government under Section 504 of the Rehabilitation Act and Section 202 of the ADA. As we next show, all of the available evidence – far from overcoming that presumption – confirms that punitive damages are not available in this case.

II. Far From Overcoming The Presumption Against The Availability Of Punitive Damages, The Text, Structure, And History Of The Relevant Statutes Demonstrate That Congress Did Not Authorize The Recovery Of Punitive Damages In This Setting

A. The Statutory And Regulatory Framework

1. *The Remedial Provisions At Issue In This Case.* Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability" shall, "solely by reason of" the disability, be "excluded from the participation in," or "denied the benefits of," or "subjected to discrimination under," any public "program or activity" that receives federal financial assistance. 29 U.S.C. § 794(a). Section 202 of the ADA prohibits the same conduct, but applies more generally to any public program, activity, "or service" and applies to all public entities regardless of the receipt of federal funds. 42 U.S.C. § 12132. Respondent's suit is predicated on claims brought under these provisions.

For each of these anti-discrimination provisions, Congress has enacted a specific provision that delineates the remedies available for violations. In 1978, five years after it passed the Rehabilitation Act, Congress amended that statute by adding the following provision:

> The *remedies, procedures, and rights* set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title [Section 504 of the Rehabilitation Act].

29 U.S.C. § 794a(a)(2) (emphasis added). In similar fashion, when Congress enacted the ADA in 1990 it included a separate provision (Section 203) that specified the remedies for violations of Section 202. That remedial provision states in full:

> The *remedies, procedures, and rights* set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title [Section 202 of the ADA].

42 U.S.C. § 12133 (emphasis added).

The pertinent remedial provisions of the Rehabilitation Act and the ADA thus are expressly linked to each other and, in turn, to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*. See Pet. App. 12a. Because of that linkage, it is necessary to examine Title VI's remedial scheme – and the progression of these closely related civil rights statutes – to discern Congress's remedial intent.

2. *The "Remedies, Procedures, and Rights" Under Title VI of the Civil Rights Act of 1964.* Enacted in 1964, Title VI consisted of five separate sections. Pub. L. No. 88-352, §§ 601-605, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000d to 2000d-4). Section 601, which contains the anti-discrimination command, provides that no person "shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

Also notable for present purposes are Sections 602 and 603, 42 U.S.C. §§ 2000d-1, 2000d-2. Section 602 directs every federal

"department or agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract" to "effectuate" Title VI's non-discrimination command "by issuing rules, regulations, or orders of general applicability" that are "consistent with achievement of the objectives of the statute authorizing the financial assistance." *Id.* § 2000d-1. It also provides:

> No such rule, regulation or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for a hearing, of a failure to comply with such requirement * * *, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

Ibid.

In addition to the requirement that any agency "rule, regulation, or order" be "approved by the President," and the further requirement that voluntary compliance be sought initially, Section 602 includes a third safeguard for funding recipients. If the enforcement action involves the termination of, or the refusal to grant or continue, financial assistance, then "the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action." 42 U.S.C. § 2000d-1. In addition, "[n]o such action shall become effective until thirty days have elapsed after the filing of such report." *Ibid.* Finally, Section 603 allows for judicial review of adverse administrative action taken under Section 602. 42 U.S.C. § 2000d-2.

In enacting Title VI, Title IX, and Section 504 of the Rehabilitation Act, Congress did not expressly provide for a private cause of action. This Court, however, has ruled that implied rights of action exist under Title IX (*Cannon* v. *University of Chicago*, 441 U.S. at 704-05) and Title VI (*Guardians Ass'n* v. *Civil Serv. Comm'n of City of New York*, 463 U.S. 582 (1983)).

3. *The Section 504 Regulations.* Pursuant to Congress's mandate in the 1978 Act, the Justice Department currently has in place regulations implementing Section 504 of the Rehabilitation Act and Section 202 of the ADA, as described at pages 5-6, *supra*.

B. Allowing Punitive Damages Would Be Inconsistent With The Statutory And Regulatory Framework

Punitive damages "are not compensation for injury" but rather are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). This Court has described punitive damages as "quasi-criminal" (*Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001)) and as "an extraordinary sanction" (*International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 48 (1979)). Moreover, once threshold questions about the availability of punitive damages have been resolved, lay juries traditionally have been "accorded broad discretion both as to the imposition and amount of punitive damages" (*Foust*, 442 U.S. at 50), subject of course to judicial review under the Due Process Clause for "gross excessiveness" (*BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 568 (1996)). Consistent with that principle, the jury in this case was charged that "[w]hether to award plaintiff punitive damages and the amount of those damages are within your sound discretion." J.A. 72. Because of the jury's broad discretion with respect to punitive damages, "the impact of these windfall recoveries is unpredictable and potentially substantial." *Foust*, 442 U.S. at 50.

The availability of such quasi-criminal exactions, levied by lay juries possessed of substantial discretion, is manifestly inconsistent with the careful and detailed remedial scheme created by

Congress in Title VI (and incorporated by extension into the provisions at issue in this case). As the Sixth Circuit has correctly recognized, "Congress has chosen other ways to 'punish' those who violate § 504." *Moreno*, 99 F.3d at 791. See generally *Alexander* v. *Sandoval*, 121 S. Ct. 1511, 1516, 1521 (2001) (describing statutory enforcement mechanisms of Title VI); *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288-89 (1998) (same for Title IX). In particular, "a *punishment* of cutoff of federal funds" is prescribed by the statute for violations of properly promulgated administrative requirements. *Singh* v. *Superintending Sch. Comm.*, 601 F. Supp. 865, 867 (D. Me. 1985) (emphasis added) (citing this as a ground for disallowing punitive damages in case brought under Title VI); see also *Moreno*, 99 F.3d at 791-92; *DeLeo* v. *City of Stamford*, 919 F. Supp 70, 74 n.7 (D. Conn. 1995).

Indeed, one reason for this Court's recognition, in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), of a private right of action under Title IX – which like Title VI includes a statutory provision allowing the sanction of funding termination – was to provide an alternative to the "severe" remedy of such termination, which this Court described as "a last resort." See *id.* at 704-05 & n.38; see also *Doe* v. *Oyster River Co-op. Sch. Dist.*, 992 F. Supp. 467, 482-83 (D.N.H. 1997) (surveying legislative history of Title IX and identifying evidence that "Congress was leery of giving private litigants the power to threaten grant recipients with large, punitive sanctions"). In *Cannon*, this Court reasoned that "*individual* relief" – *i.e.*, compensatory relief – "to a private litigant" available through a private right of action is a useful complement to the harsher cut-off remedy. 441 U.S. at 704-06 & n.38 (emphasis added).

The Eighth Circuit's conclusion, however, turns that logic on its head. Indeed, there is no reason why a punitive damages award could not vastly exceed the total amount of federal funding that a recipient has accepted, which would convert it into a much harsher penalty than the termination of funding. See *Gebser*, 524 U.S. at 290 (rejecting even compensatory damages based on

theories of *respondeat superior* and constructive notice because "an award of damages in a particular case might well exceed a recipient's level of federal funding"). And it is inconsistent with the reasoning of the Court in *Cannon* – which conceived of private rights of action as a *less* drastic alternative to the punitive remedy of a fund cut-off – to tolerate the *more* drastic remedy of punitive damages.

In addition, the "severe" funding termination remedy of "last resort" created by Congress is subject to a number of special safeguards. First, it cannot be wielded against a recipient "until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 42 U.S.C. § 2000d-1. Second, when the contemplated enforcement action involves the termination, or the refusal to grant or continue, financial assistance, then the statute provides a political check by requiring "the head of the Federal department or agency" to "file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action." *Ibid.* In addition, "[n]o such action" (*i.e.*, termination or suspension of funding) "shall become effective until thirty days have elapsed after the filing of such report." *Ibid.*

These carefully crafted limitations on the sanction of funding cut-off simply cannot be reconciled with the availability of punitive damages in a private civil action. "It would be unsound * * * for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice." *Gebser*, 524 U.S. at 289 (emphasis in original). "Where a statute's express enforcement scheme hinges *its most severe sanction* on notice and unsuccessful efforts to obtain compliance," the Court reasoned, "we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of *greater*

liability without comparable conditions." *Id.* at 290 (emphasis added). So, too, here.

The elaborate procedural safeguards in the statutes are not merely designed to afford due process to grant recipients – they also afford the Executive Branch the opportunity to calibrate the method and extent of enforcement. This is quintessentially *the government's* function, drawing as it does upon administrative expertise and the perspective that comes from managing a nationwide funding program. A regime of punitive damages, however – which leaves the enforcement consequences in the hands of a disparate array of lay juries – is apt to undermine the enforcement prerogatives of the Executive Branch. It is one thing to permit private plaintiffs to make themselves whole. It is quite another to appoint each one as a private law enforcement officer.

The Court in *Gebser* looked as well to the underlying *regulations* in evaluating whether the private damages remedy sought by the plaintiff in that case was consistent with the "express remedial scheme." 524 U.S. at 288-290; see also *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. at 643-44 (same); *Malesko*, 122 S. Ct. at 523 (relying in part on Bureau of Prisons regulations in declining to extend implied damages remedy recognized in *Bivens*).[17] As explained above, those regulations included many of the same safeguards with respect to funding termination and other sanctions that are embodied in the text of Title VI. Imposition of a punitive damages remedy is thus inconsistent with the regulations as well.

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[17] The Eighth Circuit observed that "Congress' express provision in Title VI of administrative remedies" does not "preclude[]" the "availability of additional remedies." Pet. App. 10a n.6. While so much is apparent from the availability of a private right of action, the Eighth Circuit went further, reasoning that "administrative and private causes of action are *separate and distinct* such that a limitation on one does not operate against the other." *Ibid.* (emphasis added). Such deliberate refusal to examine the regulatory remedies, however, is flatly inconsistent with this Court's analysis in *Gebser* and *Davis* and hardly required by *Franklin*.

Indeed, it may be said that the Title VI regulations – which govern claims under both the Rehabilitation Act and the ADA – flatly forbid the imposition of punitive damages in circumstances like these. Those regulations provide that "[n]o action *to effect compliance* by any other means authorized by law shall be taken until" the Department of Justice has taken certain crucial steps. 28 C.F.R. § 42.108(d) (emphasis added). A private lawsuit seeking punitive damages would appear to constitute an "action to effect compliance"; after all, punitive damages are designed, in large part, "to deter * * * future" breaches of statutory obligations. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Yet, unless and until the Department of Justice takes the steps prescribed by the regulations, "no" such "action" for punitive damages should be cognizable. Not a single one of those steps has been taken in the present matter.[18]

Moreover, in urging that punitive damages be imposed, respondent's counsel emphasized that the Justice Department had made an inquiry into petitioners' compliance with the Department's regulations under the Rehabilitation Act and ADA after

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[18] Ironically, respondent actually *predicated* most of his claim for punitive damages *on the Section 504 regulations themselves* – including the portion of the regulations setting out such simple housekeeping obligations for grant recipients as the obligation to provide assurances of compliance with Section 504 and with the accompanying regulations (42 C.F.R. § 42.504(a)), to evaluate and modify their policies and practices (*id.* § 42.505(c)(1)), to allow interested persons to participate in the self-evaluation process (*ibid.*), to make certain records available for public inspection (*id.* § 42.505(c)(2)), to designate a responsible employee to coordinate compliance (*id.* § 42.505(d)), and to adopt a grievance procedure (*id.* § 42.505(e)). See J.A. 42-45, 64-67. In essence, respondent urged the jury to punish petitioners for violating the Justice Department regulations. Apart from the fact that the regulations prescribe their own means of "effecting compliance" with the Department's housekeeping requirements (28 C.F.R. § 42.108(d) (1992, 2001)), it is highly doubtful that the alleged breach of housekeeping regulations could *ever* warrant punitive damages.

receiving a complaint from respondent's sister about his arrest. J.A. 66-67. In response to that inquiry, the Board provided the Department with information and instituted corrective measures (including installation of wheelchair locks in police vans). Far from demonstrating that punitive damages were warranted, these undisputed facts show that the regulatory enforcement measures were fully applied. The notion that these mechanisms can or should be supplemented, without legislative authorization, by a punishment of more than $1 million levied by a lay jury in a private action is utterly lacking in merit.

C. When Congress Specified The Remedies For Section 504 Violations, It Adopted The Prevailing Judicial Interpretation Of Title VI As *Not* Authorizing Such Damages

As explained above, Congress added a provision to the Rehabilitation Act in 1978 providing that "[t]he *remedies, procedures, and rights* set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance" under Section 504. 29 U.S.C. § 794a(a)(2) (emphasis added). In 1990, Congress included a similar provision in the ADA with respect to Section 202 claims, which in turn refers back to, and adopts, the remedies available for Section 504 claims under 29 U.S.C. § 794a(a)(2). The language of these provisions invites an inquiry into the "remedies" that courts had recognized in private actions brought under Title VI. Such an inquiry yields still more evidence that punitive damages are not available in cases such as this.

As the Eighth Circuit recognized below, "[w]hen Congress enacted the Rehabilitation Act and at the time of the subsequent amendments [in 1986, 1987, and 1991], courts generally agreed that Title VI and section 504 did not afford monetary damages, and were in *near unanimity* that they *did not permit punitive dam-*

ages." Pet. App. 13a-14a (emphasis added) (footnote omitted).[19] In fact, the few cases cited by the Eighth Circuit as exceptions (see *id.* at 14a n.9) do not include a single case in which punitive damages were awarded or their availability specifically addressed (and upheld) under Title VI or Section 504. That should come as no surprise because, as the Sixth Circuit has observed, it was "[n]ot until 1994 – more than two decades after enactment of the Rehabilitation Act – [that] a single United States district court permit[ted] an award of punitive damages for a violation of § 504." *Moreno*, 99 F.3d at 784; see also *id.* at 789-90. And "[n]either were punitive damages thought to be available under Title VI of the Civil Rights Act of 1964" at the time of the 1986, 1987, and 1991 amendments. *Id.* at 790 (collecting cases).[20]

This lack of judicial recognition of a punitive damages remedy was effectively endorsed by Congress when it amended the

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[19] In 1986, in response to *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985), Congress abrogated the States' Eleventh Amendment immunity with respect to suits based on violations of Section 504 of the Rehabilitation Act, Title VI, and Title IX. In 1987, Congress passed the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28, which overturned *Grove City College* v. *Bell*, 465 U.S. 555 (1984), by defining "program or activity" in Title VI, Section 504 of the Rehabilitation Act, and related statutes to include "all of the operations" of an entity, "any part of which is extended Federal financial assistance." 42 U.S.C. § 2000d-4a.

[20] The majority of cases since *Franklin* have held that punitive damages are *not* available under Title VI. See. *e.g.*, *Bayon* v. *State Univ. of New York at Buffalo*, 2001 WL 135817, at *4 (W.D.N.Y. Feb. 15, 2001); *Sims* v. *Unified Gov't of Wyandotte County*, 120 F. Supp. 2d 938, 947 (D. Kan. 2000); see also *Singh* v. *Superintending Sch. Comm.*, 601 F. Supp. 865, 867 (D. Me. 1985) (same) (pre-*Franklin*). Several of these decisions have involved municipal defendants and have relied on the holding of *City of Newport*. In *Davison* v. *Santa Barbara High Sch. Dist.*, 48 F. Supp. 2d 1225, 1233 (C.D. Cal. 1998), the district court held punitive damages to be available under Title VI, but did so based on the same misreading of *Franklin* adopted by the Eighth Circuit below.

Rehabilitation Act in 1978. As Judge Meskill explained in 1980, "in the sixteen years since the passage of Title VI, those courts that have either assumed or held that a private action may be brought under the statute have uniformly granted only declaratory or injunctive relief." *Guardians Ass'n* v. *Civil Serv. Comm'n of City of New York*, 633 F.2d 232, 256 (2d Cir. 1980) (opinion of Meskill, J.), aff'd, 463 U.S. 582 (1983); see also *id.* at 256 (discussing reported cases and noting that in none was "compensatory relief * * * awarded under Title VI").[21] See also *Guardians Ass'n* v. *Civil Serv. Comm'n of City of New York*, 463 U.S. 582, 602 n.23 (1983) (opinion of Powell, J.) ("The lower courts are generally in agreement that it is not appropriate to award monetary damages for Title VI violations.") (citing cases). This lack of judicial recognition of *any* form of damages remedy under Title VI necessarily encompassed any claim for punitive damages. Moreover, the only reported decision before Congress's enactment of the Rehabilitation Act amendments in October 1978 in which a court was called upon to specifically address the availability of punitive damages under Title VI emphatically rejected that remedy as inappropriate. See *Rendon* v. *Utah State Dep't of Employment Sec. Job Serv.*, 454 F. Supp. 534, 536-37 & n.3 (D. Utah 1978).

D. The Text, Structure, And Legislative History Of The Civil Rights Act Of 1991 Strongly Confirm That Congress Did Not Intend To Authorize Punitive Damages

The Civil Rights Act of 1991, which added Section 1981a to Title 42 of the U.S. Code, warrants special mention because it contains additional evidence that Congress never intended to permit private plaintiffs to recover punitive damages against municipal defendants under Section 504 of the Rehabilitation Act

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[21] The other two members of the Second Circuit panel did not join this portion of Judge Meskill's opinion because they agreed on other grounds with his conclusion that the district court's grant of relief under Title VI must be reversed. See 633 F.2d at 254.

or Section 202 of the ADA. The 1991 Act created a limited and carefully defined right to seek punitive damages (subject to specified monetary caps based on the size of the offending employer) in certain actions brought for intentional discrimination in employment. The punitive damages provision applies to actions brought under Section 501 of the Rehabilitation Act, 29 U.S.C. § 791, and Section 102 of Title I of the ADA, 42 U.S.C. § 12112. Significantly, it does *not* apply to actions brought under Section 504 or 202. Moreover, the 1991 Act *expressly exempts* from punitive liability under its new provisions any "government, government agency or political subdivision." 42 U.S.C. § 1981a(b)(1); see also *County of Centre*, 242 F.3d at 457.

As the Eighth Circuit recognized in this case, but inexplicably failed to credit, the "text and history of the 1991 Act" make clear that in enacting these provisions "Congress intended *to expand, and not to contract*, the available remedies" under the Rehabilitation Act and ADA. Pet. App. 15a (emphasis added); see also *ibid.* (making same observation about legislation proposed, but not enacted, in 1992). This Court has reached the same conclusion about the 1991 Act on several occasions. For example, in *Kolstad* v. *American Dental Ass'n*, 527 U.S. 533 (1999), the Court observed that, "[w]ith the passage of the 1991 Act, Congress provided for *additional* remedies, including punitive damages, for certain classes of Title VII and ADA violations." *Id.* at 534 (emphasis added); see also *Pollard* v. *E.I. du Pont de Nemours & Co.*, 121 S. Ct. 1946, 1951 (2001) (recognizing Congress's intent to provide "additional" remedies and observing that before 1991 Act punitive damages were not available "in cases of intentional * * * disability discrimination"); *Gebser*, 524 U.S. at 286 (noting that "[i]t was not until 1991 that Congress made damages available under Title VII").[22]

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[22] The legislative history of the 1991 Act confirms that Congress thought it was "*strengthen[ing] existing remedies*" by "provid[ing] more effective deterrence and ensur[ing] compensation commensurate with the harms suffered by victims of intentional discrimination." H.R. REP. No. 102-40(I), at 18 (1991) (emphasis added); see also *id.* at 64 (saying that money damages, including punitive damages, are intended to "[s]trengthen[] Title VII's remedial scheme"); H.R. REP. No. 102-40(II), at 28 (1991) ("there is a compelling need to amend Title VII to permit damages" – including punitive damages – "to be awarded in cases of intentional discrimination").

Moreover, as this Court explained in *Kolstad*, "[t]he very structure of § 1981a suggests a congressional intent to authorize punitive awards in only a subset of cases involving intentional discrimination." 527 U.S. at 534. Applied to this case, that principle demonstrates that the mere juxtaposition, without more, of the limited punitive damages provisions of the 1991 Act (42 U.S.C. § 1981a) on the one hand, and the remedial provision governing Section 504 and Section 202 (29 U.S.C. § 794a; 42 U.S.C. § 12133) on the other, provides strong structural evidence of an intent on Congress's part *not* to authorize punitive damages under the latter provisions.[23] Indeed, the Court relied in part on a similar rationale in *Gebser* in rejecting liability for school districts under Title IX in the absence of actual notice. See 524 U.S. at 285-86. The Court there explained that Congress did not "contemplate[] unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its programs." *Id.* at 285. "It was not until 1991," the Court reasoned, "that Congress made damages available under Title VII, and even then, Congress carefully limited the amount recoverable in any individual case, calibrating the maximum recovery to the size of the employer." *Id.* at 286 (citing 42 U.S.C. § 1981a(b)(3)). Accordingly, the Court refused to accept petitioner's theory of liability because it "would amount * * * to allowing unlimited recovery of damages under Title IX where Congress has not spoken on the subject of either

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[23] Several district courts have relied on that reasoning. See, *e.g.*, *Bayon* v. *State Univ. of New York at Buffalo*, 2001 WL 135817, at *4 (W.D.N.Y. Feb. 15, 2001) (1991 Act's creation of punitive damages remedy under Title I of ADA "counsels against any inference that punitive damages are available under Title II"); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1468 (M.D. Ala. 1994) (same).

the right or the remedy, and in the face of evidence that when Congress expressly considered both in Title VII it restricted the amount of damages available." *Ibid.*

The same is true here. Congress has permitted limited recovery of punitive damages under Title VII and specific employment-related provisions of the ADA and the Rehabilitation Act. It has not extended that recovery to claims brought under Section 504 of the Rehabilitation Act or Section 202 of the ADA. Moreover, Congress in 1991 *expressly exempted* governmental entities from punitive liability under the limited provisions allowing that remedy. It is positively perverse to conclude from silence alone that Congress wished to impose on governmental entities under Section 504 and Section 202 the very punitive liability that it did not expressly impose on anyone under those sections, and from which it protected governmental entities under the sections for which it did expressly authorize punitive damages.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), as amended, provides in pertinent part:

> No otherwise qualified individual with a disability in the United States, * * *, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.

Section 505 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a, as amended, provides in pertinent part:

> (a)(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.
>
> (b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, provides in full:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Section 203 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12133, provides in full:

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, provides in full:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 provides in full:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any

other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Section 603 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-2, provides in full:

Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter.

Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), provides in pertinent part:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or

be subjected to discrimination under any education program or activity receiving Federal financial assistance, * * * *

Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1682, provides in full:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over

> the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

The Civil Rights Act of 1991, 42 U.S.C. § 1981a, provides in pertinent part:

> (a) Right of recovery
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> * * * *
>
> (2) Disability
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> In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.
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> * * * *
>
> (b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

The Department of Justice regulations implementing Title VI of the Civil Rights Act of 1964, 28 C.F.R. § 42.108 (1992, 2001), provide in relevant part:

(a) General. If there appears to be a failure or threatened failure to comply with this subpart and if the noncompliance or threatened noncompliance cannot be corrected by informal means, the responsible Department official may suspend or terminate, or refuse to grant or continue, Federal financial assistance, or use any other means authorized by law, to induce compliance with this subpart. Such other means include, but are not limited to: (1) Appropriate proceedings brought by the Department to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) Noncompliance with assurance requirement. If an applicant or recipient fails or refuses to furnish an assurance required under § 42.105, or fails or refuses to comply with the provisions of the assurance it has furnished, or otherwise fails or refuses to comply with any requirement imposed by or pursuant to Title VI or this subpart, Federal financial assistance may be suspended, terminated, or refused in accordance with the procedures of Title VI and this subpart. The Department shall not be required to provide assistance in such a case during the pendency of administrative proceedings under this subpart,

except that the Department will continue assistance during the pendency of such proceedings whenever such assistance is due and payable pursuant to a final commitment made or an application finally approved prior to the effective date of this subpart.

(c) Termination of or refusal to grant or to continue Federal financial assistance. No order suspending, terminating, or refusing to grant or continue Federal financial assistance shall become effective until: (1) The responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this subpart, (3) the action has been approved by the Attorney General pursuant to § 42.110, and (4) the expiration of 30 days after the Attorney General has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) Other means authorized by law. No action to effect compliance by any other means authorized by law shall be taken until: (1) The responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the action has been approved by the Attorney General, and (3) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance.

The Department of Justice regulations implementing Section 504 of the Rehabilitation Act, provide in pertinent part:

28 C.F.R. § 42.504 (1992, 2001):

(a) Assurances. Every application for Federal financial assistance covered by this subpart shall contain an assurance that the program will be conducted in compliance with the requirements of section 504 and this subpart. Each agency within the Department that provides Federal financial assistance shall specify the form of the foregoing assurance for each of its assistance programs and shall require applicants for Department financial assistance to obtain like assurances from subgrantees, contractors and subcontractors, transferees, successors in interest, and others connected with the program. Each Department agency shall specify the extent to which an applicant will be required to confirm that the assurances provided by secondary recipients are being honored. Each assurance shall include provisions giving notice that the United States has a right to seek judicial enforcement of section 504 and the assurance.

28 C.F.R. § 42.505 (1992, 2001):

(a) Remedial action. If the Department finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this subpart, the recipient shall take the remedial action the Department considers necessary to overcome the effects of the discrimination. This may include remedial action with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred, and with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

(b) Voluntary action. A recipient may take steps, in addition

to the requirements of this subpart, to increase the participation of qualified handicapped persons in the recipient's program.

(c) Self-evaluation.
(1) A recipient shall, within one year of the effective date of this subpart, evaluate and modify its policies and practices that do not meet the requirements of this subpart. During this process the recipient shall seek the advice and assistance of interested persons, including handicapped persons or organizations representing handicapped persons. During this period and thereafter the recipient shall take any necessary remedial steps to eliminate the effects of discrimination that resulted from adherence to these policies and practices.
(2) A recipient employing fifty or more persons and receiving Federal financial assistance from the Department of $25,000 or more shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Department on request: (I) A list of the interested persons consulted, (ii) a description of areas examined and problems identified, and (iii) a description of modifications made and remedial steps taken.

(d) Designation of responsible employee. A recipient employing fifty or more persons and receiving Federal financial assistance from the Department of $25,000 or more shall designate at least one person to coordinate compliance with this subpart.

(e) Adoption of grievance procedures. A recipient employing fifty or more persons and receiving Federal financial assistance from the Department of $25,000 or more shall adopt grievance procedures that incorporate due process standards (e.g. adequate notice, fair hearing) and provide for the prompt and equitable resolution of complaints alleging any action prohibited by this subpart. Such procedures need not be established with respect to complaints from applicants for employment. An employee

may file a complaint with the Department without having first used the recipient's grievance procedures.

The Department of Justice regulations implementing the Americans with Disabilities Act of 1990, 28 C.F.R. § 35.103 (1992, 2001), provide in relevant part:

> Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by Federal agencies pursuant to that title.